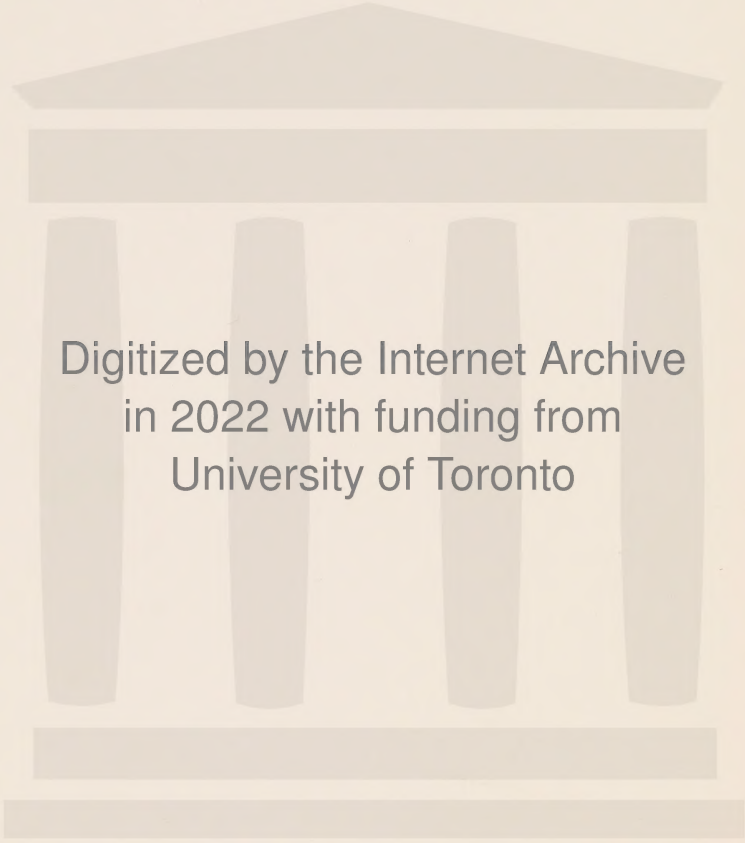
CANADA

Judicial Review of Decisions of Labour Relations Boards in Canada

CANADA DEPARTMENT OF LABOUR



JUDICIAL REVIEW OF DECISIONS OF LABOUR RELATIONS BOARDS IN CANADA

by
Jan K. WANCZYCKI

LEGISLATION BRANCH
CANADA DEPARTMENT OF LABOUR

Available by mail from the Queen's Printer, Ottawa,
and at the following Canadian Government bookshops:

HALIFAX
1735 Barrington Street

MONTREAL
Æterna-Vie Building, 1182 St. Catherine St. West

OTTAWA
Daly Building, Corner Mackenzie and Rideau

TORONTO
221 Yonge Street

WINNIPEG
Mall Center Bldg., 499 Portage Avenue

VANCOUVER
657 Granville Street

or through your bookseller

Price 50 cents, Catalogue No. L34-1869

Price subject to change without notice

The Queen's Printer
Ottawa, Canada
1969

FOREWORD

This is a study of the law that has developed on the supervisory jurisdiction of the courts over labour relations boards in Canada.

The study was done by Jan K. Wanczycki, now Chief of the Studies Division, International Labour Affairs Branch, when he was Chief of the Legal Affairs Division of this Branch. He describes the nature of labour relations boards, the authority given them by statute, and the grounds on which the courts will review and uphold or set aside board decisions.

EDITH LORENTSEN,
Director,
Legislation Branch,
Canada Department of Labour.

January 15, 1969

CONTENTS

INTRODUCTION

The basic aim of the legislation concerning industrial relations is to secure industrial peace and stability in labour-management relations, as necessary conditions for economic growth of the country and general well-being of the citizens.

Labour relations policy in Canada is based on the principle of collective bargaining between employers and those trade unions recognized as bargaining agents for employees to conclude collective agreements that form a basis for the employer-employee relationship during a specific length of time.

The labour relations boards are the principal agencies to carry out this policy and for this purpose are endowed by the statutes with necessary powers in order that the whole system of collective bargaining is carried out efficiently and without undue delays. The boards are tribunals that act in administrative as well as judicial capacities.

Labour legislation in Canada embodies the principle of finality of the labour relations board decisions and does not provide for a statutory right of appeal to courts.

In some instances, the finality of these decisions is reinforced by statutory inclusion of privative clauses that state expressly that the decisions of the boards cannot be questioned or reviewed in any court by way of prerogative writs, such as certiorari, mandamus or prohibition.

However, the statutory provisions for finality, even when reinforced by privative clauses, do not eliminate the supervisory power of the courts. This power is vested by common law through the procedures of prerogative writs. The result is a seemingly contradictory situation. On the one hand, the labour relations legislation provides for the finality of boards decisions and does not allow any recourse to the courts and, on the other hand, such decisions can be challenged in courts by using supervisory powers of the courts vested in them under common law through the use of prerogative writs.

The purpose of this study is to elucidate this apparent contradiction and to explain what is the nature of and the effects of the supervisory power of the courts over boards' decisions and on what grounds this supervisory power can be invoked and exercised.

In particular the following grounds, usually invoked for the review by the courts of the decisions of labour relations boards, have been examined: jurisdiction, questions of fact or law, natural justice, collateral issues, and error of law on the face of the record.

It should be emphasized that the courts, in reviewing the decisions, do not claim the right to decide issues submitted to the boards but the right to review the process by which the boards' decisions have been reached and to uphold or quash decisions on the grounds mentioned above.

The common law remedies evolved gradually as prerogatives vested in the courts that could be used to prevent injustices that may have been done by the lower courts or by administrative tribunals and to remedy such injustices when the right of appeal has not been provided for.

In the modern industrial state, there is a need for administrative tribunals such as labour relations boards to render prompt and final decisions. But, on the other hand, there must be a way to defend the basic human rights and freedoms inherent in a democratic society and to protect the citizens against abuse by administrative boards and tribunals of powers vested in them by the statutes.

At present, where labour relations boards are concerned, the courts are performing this function by their power to review the decisions of these boards under the procedures of prerogative writs. There is no doubt that the courts should continue to have such powers. But the question could be asked whether it might be preferable to avoid the present ambiguity and to have the powers of judicial review by the courts clearly established and defined in the relevant statutes.

NATURE OF THE BOARDS

Labour relations boards are described as:[1]

> the principal agencies of labour relations policy, in the field of union-employer relationships.

Canadian labour relations policy, as embodied in labour relations legislation, postulates collective bargaining between an employer and a trade union recognized as a bargaining agent for a determined unit of employees in order to conclude a collective agreement that will form a basis for employer-employee relationship during a specific length of time.

It is the purpose of the boards, whose members have experience and knowledge in labour matters, to see that this basic aim is carried out efficiently without undue delays and to decide various issues in a decisive way.

In order that they may fulfil their functions in a satisfactory way, labour relations legislation endowed the boards with definite powers which may be altered, amended or terminated according to the wishes of legislatures.

In the face of the complexity of labour management relations, the procedures before the boards are less formal than before regular courts and in interpreting their statutory powers the boards use a large measure of discretion.

The powers and duties of the boards are derived from the statutes under which the boards are created — in most jurisdictions the labour relations acts.[2]

---

1 Woods, H. D. and Ostry, S., *Labour Policy and Labour Economics in Canada* (Toronto: Macmillan, 1962) p. 87.

2 The legislation establishing and giving jurisdiction to labour relations boards is as follows:
Canada, Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c.152;
Alberta, Alberta Labour Act, R.S.A. 1955, c.167;
British Columbia, Labour Relations Act, R.S.B.C. 1960, c.205;
Manitoba, Labour Relations Act, R.S.M. 1954, c.132;
Department of Labour Act, R.S.M. 1954, c.131;
see particularly S.M. 1961, c.31, ss.8-10;
New Brunswick, Labour Relations Act, R.S.N.B. 1952, c.124;
Newfoundland, Labour Relations Act, R.S.N. 1952, c.258;
Nova Scotia, Trade Union Act, R.S.N.S. 1954, c.295;
Ontario, The Labour Relations Act, R.S.O. 1960, c.202;
Prince Edward Island, The Industrial Relations Act, 1962, c.18;
Quebec, Labour Code, R.S.Q. 1964, c.141;
Saskatchewan, The Trade Union Act, R.S.S. 1965, c.287.
Under the references on the following pages, or Fed., has been used to designate the I.R.D.I. Act and the name of the *province* to designate the provincial labour relations act. References are to the laws as they existed at the end of 1967.

Within the area of their jurisdiction the boards are independent agencies. The administrative control of the boards by labour ministers is usually restricted to that of selecting their members, who in some cases are proposed by representative organizations of employers and employees and who are formally appointed by Orders in Council of the respective governments.

The co-ordination of boards' activities and policies with those of labour departments is, in fact, achieved by human means: sometimes a deputy labour minister may be appointed a board's chairman or vice-chairman, and usually its chief executive officer or secretary is a permanent civil servant in a labour department. Also, most boards rely on the services of the personnel of a labour department in making their investigations and arranging for representation votes.

In fulfilling their functions the boards act in administrative as well as judicial capacity and they have been described as:

> administrative authorities necessarily exercising some judicial or quasi-judicial functions.[3]

Usually labour relations boards are described as administrative tribunals which Carrothers defined in the following way:[4]

> It [the labour relations board] is an "administrative" tribunal in the sense that the legislature has delegated to it power to determine matters of policy relating both to the substantive and to the procedural operation of the Act, to promulgate rules which it may amend, to police the statute in certain areas through its staff, and to sit in judgment on the rights, duties and powers of parties coming within the scope of the legislation.

The courts have ruled on some issues directly affecting the nature of the boards: on issues such as the legal status of the boards, their right to appear in court proceedings in support of their decisions, and the constitutional right of the provincial legislatures to give the boards specific powers.

In 1946 one issue[5] before the courts was whether or not the Saskatchewan board had the right to appeal a court decision quashing an order of the board that required an employer to bargain collectively with a union. The Saskatchewan Court of Appeal held that the board had no status to appeal, because when issuing its order the board acted judicially, and being a judicial body, the board should be impartial between the parties appearing before it. The Supreme Court of Canada[6] overruled this decision and held that, although the Saskatchewan board has judicial functions, it has never-

---

3 Cunningham, W. D., "Labour Relations Boards and the Courts", *The Canadian Journal of Economics and Political Science*, Vol. 30, No. 4, (November 1964) p. 499.

4 Carrothers, A. W. R., *Collective Bargaining Law In Canada* (Toronto: Butterworth, 1965) p. 105.

5 Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Ltd. (1946) 4 D.L.R. 574.

6 (1947) 3 D.L.R. 1.

theless status to appeal in certiorari proceedings taken to quash its order for want of jurisdiction. Mr. Justice Kerwin held that within the context of the Saskatchewan Trade Union Act the board is a legal entity that could appear in legal proceedings and has a right to appeal when its jurisdiction is questioned. Mr. Justice Estey stated:

> over a long period of time it has been recognized that where the jurisdiction of the body, constituted to discharge judicial functions, is questioned in a superior court it may defend its jurisdiction and in the event of an adverse judgment take an appeal therefrom. [p.7]

In 1948 the Saskatchewan Court of Appeal ruled[7] that the provincial legislature had no jurisdiction to grant the board judicial powers equivalent to those that are exercised by the courts, the judges of which are appointed by the Governor-General under s.96 of the B.N.A. Act; consequently, s.5(e) of the Trade Union Act was *ultra vires* of the province.

This decision was reversed on appeal to the Judicial Committee of the Privy Council.[8] Lord Simonds, after enumerating various powers granted to the board by the act, held that the borderland in which judicial and administrative functions overlap is a wide one and that the boundary is more difficult to define in the case of a body such as a labour relations board, for without doubt the greater part of its functions are in the administrative sphere. However, he also added that the feature of the board's constitution — which is conspicuously shown in the power vested in it by s.10(3) of the act (added in 1947, c.102)[9] to appeal in its own name any judgment, decision or order of any court affecting any of its orders or decisions — emphasized the dissimilarity of the board from the superior, district and county courts as contemplated under s.96 of the B.N.A. Act. The Privy Council reached the conclusions that the jurisdiction exercisable by the board is not such that the board can be constituted as a court within the meaning of s.96 of the B.N.A. Act, that s.5(e) of the Trade Union Act is *intra vires,* and that the board and its members are constitutionally established.[10]

---

7 John East Iron Works Ltd. v. United Steel Workers of America, Local 3493, (1948) 1 D.L.R. 652. The issue before the court was whether s.5(e) of the Saskatchewan Trade Union Act as enacted in 1944—which empowered the Saskatchewan board to order an employer to reinstate an employee, the victim of an unfair labour practice under s.8(1)(e), and to reimburse him for monetary loss by reason of his unlawful discharge—was *intra vires.*

8 Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. (1948) 4 D.L.R. 673.

9 s.10(3) is s.12(3) in R.S.S., 1965, c.287.

10 Tremblay . . . v. La Commission de relations ouvrières . . . (1966) R.J.B.R. Jan. 1966, No. 1. pp. 44f.

In this case the Quebec Court of Queen's Bench considered the question of the nature and power of the labour relations board in relation to s.96 of the B.N.A. Act. On this occasion Mr. Justice Casey stated:

> It is this discretion that stamps the board's power as administrative rather than judicial. So long as it is not bound to act, the decision that it renders, the power that it exercises, must be administrative. For a power to be judicial the person or, as in this case, the body exercising it

(Continued on Page 12)

Cunningham[11] stated:

> by 1948 the courts had determined that the provinces could grant the powers commonly possessed by a labour relations board, and that these boards could appear in court proceedings in support of their decisions.

By that time also, the Supreme Court of Canada had held that the board was a legal entity.

REPRESENTATIVE CHARACTER

The Chairman, who is independent, and members of a board are appointed by the Governor in Council or Lieutenant Governor in Council; usually, half of the members represent management and half, labour. The acts provide for the appointment of a vice-chairman to act in the absence of a chairman. Under the Ontario and Manitoba acts, one or more vice-chairmen may be appointed.[1]

The appointment of five vice-chairmen is provided for under the Quebec Labour Code, s.100. One vice-chairman, or more than one, may sit with the chairman on the same case and take part in the deliberations. Except in the case of an *inter-union process*[2] when the members representing the employers and employees may not vote, the vice-chairmen may not vote (s.107).

Under the New Brunswick act, s.53A, an alternate chairman may be appointed and under the Ontario act, s.75(2a), the Lieutenant Governor in Council shall designate one of the vice-chairmen to be the alternate chairman. There is no provision for a vice-chairman under the Prince Edward Island act.

The number of members on each board may vary. For the Canada Labour Relations Board the Governor in Council may appoint up to a maximum of eight members in addition to the chairman. And under the federal act, s.58(1), it is laid down that the board will consist of an equal number of members to represent each of the two groups, the employers and employees.

---

must be bound to act in accordance with predetermined rules and not possessed of any discretion in the matter. But when that body is free not to act, when its decision turns on its own idea of what the public interest requires, when the only condition imposed on it is that it remain within its law and that it respects what are generally referred to as the principles of natural justice, then that body is an administrative body and the power that it exercises is an administrative power. (p. 51)

11 Cunningham, W. B., "Labour Relations Boards . . .", p. 500.

---

1 Fed. 58(3); Alta. 6(1a); B.C. 62(3); Man. D.of L. Act 5(2), 11(5), (6); Nfld. 59(3); N.S. 55(3); Ont. 75(2); Sask. 4(1).

2 Defined as a case in which associations of employees are proposed to one another.

Similar provisions are included in the statutes of Manitoba, New Brunswick, Newfoundland, Ontario and Quebec, for the representative nature of a board is an important characteristic.[3]

Under the Saskatchewan act, s.4(1), the appointment of members to represent the general public at the discretion of the Lieutenant Governor in Council is expressly provided for, in addition to the appointment of those members representing the employers and employees.

Also, the appointment of members to represent the general public is possible in Alberta, British Columbia, Nova Scotia and Prince Edward Island, as in these jurisdictions there are no specific requirements that any board members are to represent either the employers or employees.

Under most of the statutes[4] members of the board, before acting as such, are required to take an oath of office that is concerned with fiduciary matters about the performance of their duties and an obligation to impartiality. In the federal act there is nothing about an oath of office; nevertheless, such an oath is taken by members of the Canada Labour Relations Board.

The representative character of the boards may create a conflict of interest and lead to allegations of bias, likelihood of bias or partiality. On these grounds some decisions of the boards were successfully challenged in courts.[5]

In Manitoba, Newfoundland and Quebec, the acts contain express provisions covering situations of conflict of interest.[6] In Manitoba and Newfoundland the appointment of alternate members to serve on each board, in cases where regular members are disqualified for *undue interest,* is provided for. The Manitoba Department of Labour Act, s.11(6B), provides that:

> a member shall be deemed to have an undue interest in any particular matter
>
> (a) if he declares he has such an interest; or
> (b) if a majority of the other members of the board so declare.

In Quebec a different approach has been adopted (s.107), as described at the beginning of this chapter. In the case of an inter-union process, only the chairman, and if present, the vice-chairman, may vote and decide the case. The board members who represent the employers and employees are relegated to the positions of advisers; they may present their views but not vote.

The Quebec method of dealing with an inter-union process implies a departure from the principle generally accepted under the other acts: the

---

3 Man. D.of L. Act 11(4); N.B. 53(1); Nfld. 59(1); Ont. 75(2); Que. 103.

4 B.C. 62(10); Nfld. 59(6); N.S. 55(9); Ont. 75(5); P.E.I. 9(8); Sask. 4(10); Man. D.of L. 11(15)

5 Carrothers, A. W. R., *Collective Bargaining Law . . .*, pp. 108-9.

6 Man. D.of L. Act 11(6A), (6B); Nfld. 59(2).

chairman of the board — as being only first among equals, with regard to the other members — can be overruled in decisions made by the majority of the board members.

This situation pertains for the Canada Labour Relations Board under the Rules of Procedure, s.4(2). The rules provide that the decision of the majority of the board members (constituting a quorum) is the decision of the board.

Although the finality of board decisions is provided for under the acts, the boards may change or reverse a decision at their own volition, or at the request of any of the parties concerned. The boards may, and often are inclined to, follow the line of policy that has been established by their former rulings. Nevertheless, unlike the courts, it is easier for the boards to be more flexible in their decisions and to depart from precedents to promote industrial peace and harmonious labour-management relations.

POWERS

Generally speaking, there are three areas of authority granted to the labour relations boards under labour legislation: the power to make investigations and inquiries; the power to make procedural regulations; and the power to make decisions.

For example, by the federal act, s.58(5), the Canada Labour Relations Board has the same powers that are given to Commissioners under Part I of the Inquiries Act: the board may receive and accept evidence and information on oath, affidavit or otherwise, whether or not admissible as evidence in a court of law, as the board in its discretion may consider fit (s.58(6)).

Also, the Canada Labour Relations Board, with the approval of the Governor in Council, may make regulations (s.60) to govern procedure, to fix a quorum and, where an application for certification has been refused, to set the time when a further application may be made for the same unit by the same applicant. Regulations of the board come into effect upon publication in the *Canada Gazette*.

The main functions of the labour relations boards are to settle issues about the appropriateness of a bargaining unit and to determine whether or not a union may be recognized as an exclusive bargaining agent for a unit found appropriate by the board. Thus the boards have statutory powers to make decisions as the result of proceedings and hearings in matters such as whether a person is an employer or employee, whether an organization or association is an employers' organization or a union, whether a group of employees is a unit appropriate for collective bargaining, whether an employee belongs to a craft or group exercising technical skills, or whether a person is a union member in good standing.

The boards may include or exclude employees from the bargaining unit when certification is applied for. The boards may make necessary inquiries, examine records, hold hearings, prescribe the nature of evidence to be furnished and order a representation vote to determine whether or not a majority has selected the trade union to be their bargaining agent. The boards may refuse certification if, in their opinion, a union is influenced or dominated by the employer. The boards may revoke certification if, in their opinion, a bargaining agent no longer represents a majority of employees in the unit. The boards may order an employer to bargain collectively; and they may decide if, by its terms, a collective agreement is in effect.

Some boards also have the right to investigate complaints about unfair practices.[1] They may issue orders to cease and desist and to reinstate the rights, privileges and pay of employees (British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan).

All boards have the power to rescind or revoke any of their orders or decisions.

The Ontario Labour Relations Board has the authority to deal with disputes over work assignments (s.66).

When carrying out their statutory duties under the labour legislation in resolving various issues, the boards often have to make decisions that of necessity are incidental to their statutory powers. Decision of this kind may deal with issues such as whether or not the matter is within the board's jurisdiction under the terms of the B.N.A. Act, and whether or not there is any other legislation that excludes an employer or his employees from the jurisdiction of the board.

NATURE OF THE BOARDS' DECISIONS

Labour legislation in Canada embodies the principle of finality of decisions by the labour relations boards and does not provide for formal appeal to the courts. This approach was motivated by the need for decisiveness in the boards' powers to try to ensure stability in labour-management relations. It some instances the principle of finality of decisions has been reinforced by the inclusion of privative clauses in the statutes. Nevertheless, the statutory provisions for the finality of decisions, even with the inclusion of privative clauses, do not eliminate the supervisory power of the courts over decisions by the labour relations boards. This supervisory power is vested in the courts under common law through the use of prerogative writs.

---

1 B.C. 7; Man. 6A; N.S. 40; Ont. 65; Que. 14; Sask. 5(d), (e), (f), (g).

By statutory provisions[1] then, the decisions of the boards are made final and conclusive.[2]

By all labour relations acts the boards are granted the power to review their decisions if the boards consider this advisable. For example, in the federal act, s.61(2), it is stated:

> A decision or order of the Board is final, and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act.

Privative Clauses and Their Effects

The statutory provisions on the finality of decisions are strengthened in some acts by the inclusion of the so-called privative clauses. These state that the decisions of the boards cannot be questioned or reviewed in any court by way of certiorari, mandamus, prohibition or quo warranto. The Ontario act, s.80, provides the most detailed privative clause:

> No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Specific references to certain of the prerogative writs and injunctions are also contained in the privative clauses in Quebec (s.121)[3] and Saskatchewan (s.20). In the federal, Manitoba, New Brunswick, Newfoundland and Nova Scotia acts, it is simply stated that the decision of the board is final and conclusive and not open to question or review. Nevertheless, it has been questioned whether these expressions constitute privative clauses in the true sense and whether they limit the application of certiorari.[4]

If we assume that a privative clause should contain a statement to the effect that a decision of a board is not open to question, appeal or review, then there is no privative clause in the true sense in the Alberta and British Columbia acts. However, it should be noted that Mr. Justice Hall of the Supreme Court of Canada, with reference to s.65(1) of the British Columbia

---

1 Fed. 61(1), (2); B.C. 65(1); Man. 59(1); N.B. 55(1), (2); Nfld. 62(1), (2); N.S. 58; Ont. 79; P.E.I. 12(1); Sask. 20.

2 In the former Quebec Labour Relations Act, s.41a(a), it is stated that *the decisions of the board shall be without appeal and cannot be revised by the courts;* there is no similar provision in the labour code but the privative clause in s.121 is to the same effect.

Under the Alberta Labour Act, s.70a, a decision of the board about whether or not a person is an employee for the purpose of Part V of the act (Labour Relations) is final.

3 s.121 of the Quebec code that contains privative clauses applies not only to the decisions of the labour relations board but also to those of the council of arbitration, court of arbitration and conciliation officers.

4 See the statement of Mr. Justice Smith discussed later in this section (Federal Electric Corporation case).

act where it is simply stated that the decision of the board *shall be final and conclusive,* held that this provision amounts to a privative clause.[5]

It should be noted that in Alberta the finality of the Board's decisions, and elimination of the recourse to prerogative writs except with the permission granted by the Lieutenant Governor in Council, may be implied from the provisions contained in s.24(2) of the Judicature Act (R.S.A. 1955, c.164) which reads as follows:

> 24(2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

The presence of a privative clause in the statute does not exclude the power of the courts to review a decision by a board. The court stated in the Bruton case:[6]

> A statutory abolition of the right to certiorari is not wholly effective, for it is clearly established by authority that notwithstanding a provision in a statute abolishing certiorari, the Courts will still exercise the power to issue the writ where the conviction or order complained of has been made without jurisdiction.

The form of privative clauses and their effects were considered by Mr. Justice Smith of the Manitoba Court of Queen's Bench in one case.[7] The judge noted that on the application for certiorari the court was not concerned with the merits of the board's decision, but only with two questions: whether the board was acting within the powers given it by the act, that is acting within its jurisdiction, and whether there was an error in law apparent on the face of the record. The authority for this position quoted by Judge Smith was 11 *Halsbury,* 3rd ed., where, referring to the control exercisable by a superior court over inferior jurisdictions by way of mandamus, prohibition and certiorari, it is stated:

> The degree of control which can be exercised is limited: provided that the tribunal keeps within its jurisdiction and obeys the rules of natural justice, and refrains from setting out in its record the reasons for its decision, the court cannot interfere. [p.53]
>
> Where upon the face of the proceedings themselves it appears that the determination of the inferior tribunal is wrong in law, certiorari to quash will be granted. The tribunal is not (unless so required by statute) obliged to set out

---

5 Bakery and Confectionery Workers' International Union of America, Local 468 *et al.* v. White Lunch Ltd. *et al.* (1966) 55 W.W.R. 129; 1966 CLLC 14, 110. Summarized in the *Labour Gazette,* LXVI: 376-8 (July 1966).

6 Bruton v. Regina City Policemen's Association, Local 155. (1945) 3 D.L.R. 437; at p. 446. (Referred to and quoted in Carrothers, A. W. R., *Collective Bargaining Law . . .* , p. 135.)

7 Federal Electric Corporation v. International Brotherhood of Electrical Workers, Local Union 2085 and Canada Labour Relations Board (1964) 47 W.W.R., Part 7, p. 391. Summarized in the *Labour Gazette,* LXIV: 885-8 (October 1964).

> in its adjudication the reasons which led to its decision, but if it does state them the superior court will consider the question whether they are right in law, and if they are wrong in law, will quash the decision. [par.118, p.61]

Thus, Judge Smith noted, the general power of the superior courts according to *Halsbury* is reduced where there is a privative clause in the statute that expressly forbids the decisions of the inferior body from being questioned or reviewed in proceedings by way of certiorari.

The difference that is made by the absence or presence of a privative clause was made plain by Mr. Justice Roach of the Ontario Court of Appeal in the Bradley case[8] (also referred to by Judge Smith in the case just mentioned):

> In the absence of a privative clause, the Court in certiorari proceedings has power to examine the record returned to it by the inferior tribunal and, if that record discloses error on the part of that tribunal, to quash its decision as having been made in error. Also, if it appears to the Court that the inferior tribunal acted beyond its jurisdiction then the Court has the power in certiorari proceedings to quash the decision of that tribunal as having been made without jurisdiction. However, where there is a privative clause, the Court is restricted to determining whether or not the inferior Court acted within the limits of its jurisdiction. [p.79]

Judge Roach also pointed out that where there is a collateral matter to be decided on which the jurisdiction of the lower tribunal depends, the lower tribunal's decision on that collateral matter is subject to review by certiorari, and the superior court will weigh the evidence and decide whether the decision was right or wrong. He then added:

> Where the matter is not collateral but constitutes part or the whole of the main issue which the inferior tribunal had to decide, the Court is limited to examining the record to determine whether there was any evidence before the inferior tribunal... the Court can do that only in the absence of a privative clause. If there is a privative clause in the Act creating the tribunal, the Court cannot do that. [p.81]

In the Federal Electric case Judge Smith expressed the opinion that it was at least doubtful whether the privative clause in the federal act (s.61(2)) was sufficiently specific in its terms to exclude certiorari where the question is one of error on the face of the record. And he added that no privative clause excludes an application for certiorari where the question is one of the lower tribunal having jurisdiction, refusing jurisdiction or exceeding jurisdiction.

Mr. Justice Hall of the Supreme Court of Canada quoted in a recent case[9] the following statement made in the same case by Mr. Justice Bull of the British Columbia Court of Appeal[10] on the effect of a privative clause:

---

8 Re Ontario Labour Relations Board; Bradley v. Canadian General Electric Co. Ltd. (1957) 8 D.L.R. (2d) 65.

9 Bakery and Confectionery Workers' International Union of America, Local 468 v. White Lunch Ltd. (1966) 55 W.W.R. 129; at p. 142.

10 (1965) 51 D.L.R. (2d) 72.

Similarly, it is well established law that when there is a privative clause such as s.65(1) the Court in certiorari proceedings is restricted to determining whether or not the tribunal, in this case the Board of Labour Relations, acted within its jurisdiction, including matters such as denial of natural justice, bias, fraud, etc., or whether there is error on the face of the record. In the disposition of issues within its jurisdiction, the Board's decision, including certification of a trade union, is not open to judicial review, unless the Court determines that the Board's error goes to jurisdiction as opposed to an error within its jurisdiction. The decision of the Board as to who are employees and who are employers is a finding solely within the jurisdiction of the Board and is "final and conclusive" and not open to judicial review: Labour Relations Board *et al.* v. Traders' Service Ltd. (1958) S.C.R. 672.

The inclusion of privative clauses in the labour relations acts has not prevented the courts from asserting the power to review decisions of the boards by prerogative writs and to quash decisions on grounds that are considered in another chapter. This situation led to doubts as to the effectiveness of the privative clauses.[11] It should be stressed that the intervention of the courts with regard to decisions of the labour relations boards (and other administrative boards or tribunals) by prerogative writs is not considered to be the right of *appeal*[12] but that of *review,* or to use the expression of Lord Sumner, the right of *supervision.*[13] The difference is that the courts do not claim the right to decide issues submitted to the boards, as the courts exercising the appellate jurisdiction would claim; but they claim the right to *review* or *supervise* without deciding the issues, and to uphold or quash decisions by the boards or to remit such decisions for further consideration on certain specific grounds under common law right by prerogative writs. Thus the courts exercise a supervisory jurisdiction, not an appellate jurisdiction.[14]

This raises questions of why, in what circumstances, and on what grounds, the courts may review such decisions by the use of prerogative writs despite statutory provisions for the finality of decisions and the existence of privative clauses.

LIMITATIONS TO THE FINALITY OF DECISIONS

Under common law the courts have no power to review the substance of the decision of an administrative tribunal, except on the question of law,

---

11 Laskin, Bora, "Certiorari to Labour Boards: the Apparent Futility of Privative Clauses", *The Canadian Bar Review,* XXX: 986-1003 (December 1952).

12 In the case of Parkhill Bedding and Furniture Ltd. v. International Molders and Foundry Workers of North America, Local 174, and Manitoba Labour Board, (1960) 33 W.W.R., Part 4, p. 176 and (1961) 26 D.L.R. 2d, Part 8, p. 589 (summarized in the *Labour Gazette,* LXI: 158-9 (Feb. 1961) and LXI: 477-80 (May 1961)), Mr. Justice Freedman of the Manitoba Court of Appeal stated that the court cannot sit in appeal on the board's decision because the board has the right to be wrong, provided it acts within its jurisdiction.

13 Rex v. Nat Bell Liquors Ltd., (1922) 2 A.C. 128; at p. 156.

14 Regina v. L.R.B. of Sask., *ex parte* Tag's Plumbing and Heating Ltd. (1962) 34 D.L.R. (2d) 128.

though *they do have power to review the process whereby the decision is arrived at.*[1]

Prerogative writs are traditional common law remedies that can be invoked in the courts to prevent injustices that may have been done by the lower courts or by administrative tribunals, and provide effective means by which the injustices may be remedied when the right of appeal is not provided for. Even when the statutes expressly state that a tribunal's decision is final, persons who feel aggrieved by a tribunal's decisions may rely on the *historic supervisory authority* of the courts over inferior tribunals by way of prerogative writs of certiorari, mandamus and prohibition.[2]

Prerogative Writs

These writs are prerogative in the sense that the court's power to issue them is traditional and inherent; they are not based on authority conferred on the court by statute.

The courts in issuing the prerogative writs do not act as courts of appeal; the writs are procedural in that they are directed to a defect in the proceedings leading to the tribunal's decision, but are not directly concerned with the merits of the decision.

The courts may deny the writ — and in this way uphold the decision of the lower court or tribunal — or may grant the writ and would thus either quash such decision or refer the case back to the lower court or tribunal for further consideration.

Prerogative writs applied to decisions of a labour relations board are certiorari, prohibition, mandamus and quo warranto; and the writ most frequently used in labour cases is that of certiorari.

Certiorari may be described as a remedy by which the court orders some lower court or tribunal to send up the record of any proceeding or decision of a judicial nature. The court may quash the decision completely, reject the decision and send the case back to the lower court or tribunal for reconsideration according to the ruling of the court, or may refuse to interfere with the decision; however, the court may not in any way substitute its own decision for that of the lower court or tribunal. Usually, there are three main grounds for certiorari: 1. Defect of jurisdiction (want of jurisdiction, excess of jurisdiction, abuse of jurisdiction); 2. Breach of natural justice (*audi alteram partem,* no interest, reasonableness, fraud or collusion); 3. Irregularity or error of law on the face of the record (proceedings).[3]

---

1 Willis, John, "Administrative Decision and the Law: The Views of a Lawyer." *The Canadian Journal of Economics and Political Science*, Vol. 24, No. 4 (November 1958) p. 509.

2 Millward, P. J., "Judicial Review of Administrative Authorities in Canada." *The Canadian Bar Review*, XXXIX: 351-95 (March 1961), p. 352.

3 Yardley, D.C.M., "The Grounds for Certiorari and Prohibition", *The Canadian Bar Review*, XXXVII: p. 295, 354-5 (May 1959).

A writ of prohibition is issued by a court to a lower court or tribunal to restrain it from carrying on with the proceedings. Prohibition is similar to certiorari except that it is applied where the proceedings in the lower court or tribunal have not been completed. It prevents something happening or continuing; if the proceedings have ended in the lower court or tribunal, certiorari is the more appropriate writ. The grounds for prohibition are similar to those for certiorari.[4]

A writ of mandamus is issued to require a lower court or tribunal that exercises judicial functions to carry out some statutory duties and to make decisions — for which the applicant has a legal right — to have something done. Usually, a motion for mandamus is made to force a labour relations board to assume jurisdiction and reach a decision.

A writ of quo warranto was formerly issued by the King's Bench Division calling a person to show by what warrant he held or exercised an office or franchise.[5] It is a Writ that lies against him that usurps any Franchise or Liberty or Office.[6]

Right of the Courts to Intervene

In 1948 when the Privy Council confirmed[7] the power of the Saskatchewan Labour Relations Board to order reinstatement of dismissed employees and upheld the constitutionality of the board, the problem of the effect of the privative clause was brought to the attention of the court. The Judicial Committee held that there was a limitation to the finality of the board's decision. Lord Simonds stated:

> It does not fall to their Lordships upon the present appeal to determine the scope of that provision but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act. [p.683]

Referring to the statutory powers of the Ontario Labour Relations Board and considering the privative clauses contained in the Ontario act, Mr. Justice Rand stated the basic right of the courts to intervene in the decisions of the board in the following way:[8]

> Every such enactment, consciously or subconsciously, lies within a general and vague but nonetheless real scope of action within which the body created is contemplated and intended by the Legislature to act; and the privative provision, s.5, is designed to exclude the control of the Courts within that area. In the

---

4 Ibid., . . . 295-6, 354 (May 1959).

5 The Concise Oxford Dictionary of Current English, (Oxford University Press, 5th ed., 1964) p. 1011.

6 Stroud, Frederick, *The Judicial dictionary, of words and phrases judicially interpreted, to which has been added statutory definitions* (London: Sweet, 2nd ed., 1903-31) p. 1642.

7 Labour Relations Board of Sask. v. The John East Iron Works Ltd. (1948) 4 D.L.R. 673.

8 Toronto Newspaper Guild v. Globe Printing Co. (1953) 3 D.L.R. 561. Summarized in the *Labour Gazette*, LIII: 1174-7 (August 1953).

> absence of a clear expression to the contrary, we are bound by the principle that ultra vires action is a matter for the superior Courts: the statute is enacted on that assumption. Any other view would mean that the Legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision: but that is within neither our theory of legislation nor the provisions of our constitution. The acquiescence of the Legislatures, particularly during the past fifty years, in the rejection by the Courts of such a view confirms the interpretation which has consistently been given to the privative clause. [p.572]

Mr. Justice Kellock in his reasons for judgment referred to Board of Education v. Rice (1911) A.C. 179. In this case the House of Lords laid down principles that apply to a tribunal like the labour relations board, and Lord Loreburn stated that such a tribunal:

> must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. [p.182]

and went on, with reference to the powers of the board to obtain information in any way it thought best, that in so doing this must always be by:

> giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

Mr. Justice Cartwright in his reasons for judgment summed up the situation in stating it was conceded that the Supreme Court of Ontario has the power in proceedings by way of certiorari to set aside the order of the labour relations board if it appeared that the board had failed to perform its duty to *act in good faith and fairly listen to both sides* (the duty stated by Lord Loreburn in Board of Education v. Rice), or that the board had exceeded its jurisdiction, or that the board had declined jurisdiction.

JURISDICTION

The issue of jurisdiction is frequently invoked in courts as a ground for reviewing the decision of a labour relations board, for under an act the finality of a decision is restricted to a situation where the board is acting within the area of jurisdiction assigned to it by the act. This implies also that a board can be compelled to exercise such jurisdiction if in the opinion of a court a matter submitted to the board is within the area of its statutory jurisdiction. Thus, a particular decision may be brought before a court by certiorari proceedings on the ground that a board in deciding an issue has acted outside its jurisdiction or has exceeded it; or a matter may be submitted to the courts on mandamus to compel a board to assume jurisdiction and make a decision.

The basic right of the courts to intervene in the decisions of a labour relations board on this issue was restated by the Supreme Court of Canada

in the Toronto Newspaper Guild case[1] in 1953. On that occasion Mr. Justice Kerwin said:

> [an] excess of jurisdiction has invariably been held to be a ground upon which a superior court could quash an order of an inferior tribunal.
>
> We start with the proposition that when an administrative tribunal has been set up by a paramount legislative body it is the intention that such tribunal keep within the powers conferred upon it. In England and in Canada the decisions have been uniform that a superior court is invested with the power and duty of seeing that such a tribunal as the Ontario Labour Relations Board does not act without jurisdiction. [p.567]

Among other decisions Judge Kerwin referred to the British one in Reg. v. Marsham (1892) 1 Q.B. 371, a case in which the Court of Appeal granted an application for mandamus. Lord Esher, having stated that the application for mandamus was made on the ground that the magistrate declined to exercise the jurisdiction given to him by law, went on:

> he has refused to hear the evidence, even though it would prove that fact; he has, therefore, declined jurisdiction. [p.378]

When the Toronto Newspaper Guild case was in the Ontario Court of Appeal,[2] Chief Justice Robertson quoted the following statement of Lord Sumner in Rex v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128:

> Its [the court's] jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in twin, transgress the limits within which its own jurisdiction of supervision, not of review, is confined.
>
> That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise. [p. 156]

It could be added that the right of the courts to review the decisions of administrative tribunals on the issue of jurisdiction (whether federal or provincial) is inherent in the nature of the Canadian constitutional system. In the field of labour-management relations, jurisdiction is divided between federal and provincial governments according to the distribution of powers between the two levels of governments under the B.N.A. Act, ss.91 and 92, and as applicable to the subject matter. Consequently, the problem of jurisdiction becomes a constitutional issue when the question is raised whether or not a particular board, in assuming jurisdiction, acted within the area of jurisdiction allotted to that particular level of government by the B.N.A. Act.

---

1 See footnote 8 of previous section.

2 (1952) 2 D.L.R. 302. Summarized in the *Labour Gazette*, LII: 615-7 (May 1952).

QUESTIONS OF FACT OR LAW

A labour relations board in reaching a decision may have to consider an issue of fact or of law — or both. In general it is not specified in the acts that a board may decide either,[1] though the Ontario act, s.79(1), states:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

It should be noted that under the Nova Scotia act, s.58(2) and (3), the board may on its own motion state a case in writing for the opinion of the Supreme Court upon any question that, in the opinion of the board, is a question of law; and the Supreme Court shall hear and determine such question of law and remit such opinion to the board. The same provisions are included in the Prince Edward Island act, s.12(2) and (3).

It may be assumed that the courts have no power to intervene to review decisions of a board on an issue of facts, on their interpretation, or on the issue of policy, or on questions of whether or not the evidence presented to a board was adequate or of the right kind, as long as the parties could present their evidence and such evidence was considered by the board before making a decision. However, the courts do have, as already noted, power to review the process by which a board's decision is reached.

If the question is one of a decision on an issue of law, the courts as a matter of principle under the common law have the power to review such a decision.[2]

However, it should be noted that the Supreme Court of Canada in the Farrell case[3] held that when a statute grants to an administrative tribunal (in that case the Workmen's Compensation Board of British Columbia) exclusive jurisdiction to decide *all matters and questions of fact and law,* a board's decision on the issue of law is not open to any judicial review, in-

---

1 The Saskatchewan Trade Unions Act, before it was amended in 1966, provided in s.17 that there was no appeal from an order or decision of the board and the board "shall have full power to determine any question of fact necessary to its jurisdiction"; s.17 was repealed in 1966 (c.83, s.11) and replaced by s.20 where the previous reference to "question of fact" was omitted.

2 When a specific question of law regarding the interpretation of a collective agreement was referred to arbitrators (in the case of a review of a decision of an arbitration board under a collective agreement) it was held by the courts that the board's decision was not reviewable on certiorari. (Canadian Westinghouse Co. Ltd. and United Electrical, Radio and Machine Workers of America, Local 504, (1962) 30 D.L.R. (2d) 676, summarized in the *Labour Gazette* LXII: 452-3 (April 1962; and Regina v. Bigelow *et al., ex parte* Sefton (1965) 50 D.L.R. (2d) 38, summarized in the *Labour Gazette*, LXV: 833-4 (September 1965).

3 Farrell *et al.*, v. Workmen's Compensation Board (1962) 37 W.W.R. 39; summarized in the *Labour Gazette*, LXII: 539-540 (May 1962).

cluding certiorari. Also, the court held that there is no constitutional rule against a statutory provision preventing a review by the courts of a board's decision upon a question of law.

Somewhat extreme views regarding the power of the Ontario Labour Board to decide an issue of law were expressed by Mr. Justice Laidlaw in the Food Terminal case.[4] The question before the board was whether or not the Ontario Food Terminal Board was a crown agency, and Judge Laidlaw stated:

> I may say at once that in my opinion the Ontario Labour Relations Board had no right or power to determine that question. It is a pure question of law which can be determined only by a judge or judges appointed by the Governor-General pursuant to the provisions of the British North America Act. [And he added] . . . when the question of jurisdiction or any other question of pure law is raised in a proceeding before a tribunal so constituted, the proceeding should be stayed until such question has been finally determined by a court of competent jurisdiction. [p.532]

Judge Laidlaw also expressed the view that the provision of the Ontario act (by which power is granted to the labour relations board to determine every question of fact or law) was contrary to established law. These views conflicted with the judgments of the Supreme Court of Canada and the Privy Council, on which the judgment in the Farrell case was based.

On the subject of deciding an issue of law by the Ontario board, Chief Justice McRuer stated in a case[5] which came before the courts a few months after the Food Terminal case:

> The sections of the Labour Relations Act in question are constitutional and I do not think it was beyond the powers of the Legislature to clothe the Labour Relations Board with jurisdiction to make decisions of law incidental to its administrative duties. Obviously the Board must decide many incidental questions of law in the performance of its administrative functions but in saying this I do not wish it to be taken that I think that the Board has power to make decisions in law with respect to collateral matters which may not be reviewed on certiorari. In other words, it cannot give itself jurisdiction by wrong decisions in law. [p.462]

In another case the Supreme Court of Canada:[6]

> rejected the suggestion in the lower court that the Board had jurisdiction only in matters of fact.[7]

---

4 Regina v. O.L.R.B. *ex parte* Ontario Food Terminal Board (1963) 38 D.L.R. (2d) 530; summarized in the *Labour Gazette*, LXII: 909-11 (October 1963).

5 Regina v. O.L.R.B., *ex parte* Taylor, (1964) 41 (D.L.R.) (2d) 456; summarized in the *Labour Gazette*, LXIV: 410-11 (May 1964).

6 La Commission des Relations Ouvrières de la Province de Québec v. Burlington Mills Hosiery Co. of Canada Ltd. *et al.* (1964) 45 D.L.R. (2d) 730; summarized in the *Labour Gazette*, LXV: 52-4 (January 1965).

7 Carrothers, A. W. R., *Collective Bargaining Law . . .*, p. 131.

Willis[8] expressed the view that the courts assert the common law right to review decisions of the boards on issues of law, although they have no right to review any question of policy on grounds that the policy is the responsibility of a board or a minister and not that of the courts. However, he pointed out that it is sometimes difficult to separate a question of law from a question of policy. For example, is the decision of a board on whether or not an employee is employed in a *confidential* capacity within the meaning of the Act a *reviewable question of law or a non-reviewable question of policy*?[9]

It would appear that the boards have jurisdiction to decide questions of fact and questions of law. The courts have no power to review the boards' decisions on issues of fact. They can review the decisions of questions of law, except when the statutes expressly grant boards the power to decide such issues. However, the courts, by way of prerogative writs, can always review the process by which any decision of a board has been reached.

NATURAL JUSTICE

The courts have claimed the right to review and to quash decisions of any labour relations board or any administrative tribunal by prerogative writs on an issue of natural justice, and basic rules for applying such a principle to the decisions of a board have been expounded in the following judgments.

Lord Loreburn stressed (1) *to act in good faith* and (2) *to fairly listen to both sides* when he stated:[1]

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend on matter of law alone. In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. [p.182]

Viscount Haldane concurred with this, saying:[2]

> I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In Board of Education v. Rice . . . he laid down that, in

8 Willis, John, "Administrative Decision and the Law: The Views of a Lawyer." *The Canadian Journal of Economics and Political Science*, Vol. 24, No. 4, (November 1958) p. 511.

9 *Ibid.*, p. 511. With reference to Canada Safeway Limited v. Labour Relations Board *et al.* (1953) 1 D.L.R. 48 (B.C.C.A.) and (1953) 3 D.L.R. 641 (S.C.C.); summarized in the *Labour Gazette*, LIII: 284-6 and 1170-2 (February and August 1953).

1 Board of Education v. Rice (1911) A.C. 179.

2 Local Government Board v. Arlidge (1915) A.C. 120.

> disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. [pp.132-3]

And Lord Tucker has said:[3]

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. [p.118]

Thus, by the principle of natural justice, a board or an administrative tribunal — as well as a court — is required: (1) to hear the parties involved (*audi alteram partem*), (2) to give the parties a chance to present their points of view and to answer charges, and (3) to act in good faith and without bias or fraud. If the court finds that a board in exercising its statutory duties has violated the principle of natural justice when making a decision, then the court will quash such decision.

A distinction is made between the right to a hearing and the right to make representations in writing. Carrothers[4] has pointed out that the trend from cases seems to be that if representations and evidence can be submitted in writing, a party has no cause to complain if its request for a hearing is denied.

However, by contrast, Carrothers also noted the decisions in the Toronto Newspaper Guild case. The trial court[5] held that the employer had a right to be heard, since a regulation of the board made provision for a hearing; and the Supreme Court of Canada[6] held that the adverse order of the board must be quashed, since the employer had been refused the right to adduce evidence through cross-examination and to examine documents filed by the union. Carrothers[7] quoted from the Supreme Court decision the following:

> The statute . . . proceeds upon the view that the hearing is to be a real hearing, fairly conducted as between the opposing parties whatever may be the issue which the Board may be called upon to determine in particular circumstances.

The question of giving notice to a party concerned in proceedings be-

---

3 Russell v. Norfolk (Duke) (1949) 1 All ER 109.

4 Carrothers, A. W. R., *Collective Bargaining Law . . .*, p. 145.

5 (1951) 3 D.L.R. 162. Summarized in the *Labour Gazette*, LI: 932-8 (July 1951).

6 (1953) 3 D.L.R. 561. Summarized in the *Labour Gazette*, LIII: 1174-7 (August 1953).

7 Carrothers, A. W. R., *Collective Bargaining Law . . .*, p. 145.

fore a board was considered by the Manitoba Court of Queen's Bench[8]. One of the reasons for quashing the board's decision was that the board did not give notice to the company when it decided to reconsider its decision; consequently, the company had no opportunity to be heard. Mr. Justice Freedman held that, with respect to judicial or quasi-judicial acts, there is always a right to notice unless this is clearly dispensed with by the statute. Thus, if it is not, the right to notice must be taken to exist, and the court ruled that the board had no jurisdiction to proceed with a reconsideration of its order without notice to the company concerned. Consequently the board's order was quashed, since it was made in excess of the board's jurisdiction and in denial of natural justice.

The issue of lack of notice has been discussed by Weatherill,[9] who noted it is the rule that a party, other than the informant, must be apprised of the information whenever such information or argument may adversely affect it. However, there are times when it may not be necessary to give an opportunity for reply. He noted that in giving the judgment of the Supreme Court of Canada, Mr. Justice Judson stated:[10]

> after hearing from one side and hearing from the other side in reply, it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop. [p.321]

COLLATERAL ISSUES

The principle that a court has jurisdiction to review a decision on a collateral issue was stated by Mr. Justice Coleridge:[1]

> Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court. [p.139]

Canadian authorities have differentiated between issues that are collateral (extrinsic, preliminary or incidental) and those that are main issues. The courts have held that decisions of the board on collateral issues may be reviewed through the use of prerogative writs, but that decisions of the

---

8 Labour Relations Act: Northern Taxi Ltd. v. Manitoba Labour Board (1959) 27 W.W.R. 12. Summarized in the *Labour Gazette*, LIX: 498-501 (May 1959).

9 Weatherill, J. F. W., "Labour Relations Boards and the Courts." *Industrial Relations*, Vol. 21, No. 1, 1966, p. 68.

10 Forest Industrial Relations Ltd. v. International Union of Operating Engineers, Local 882 (1962) 31 D.L.R. (2d) 319. Summarized in the *Labour Gazette*, LXII: 344-5 (March 1962).

---

1 Bunbury v. Fuller (1853) 9 Ex b. 111.

boards on main issues are not subject to review and thus the board's jurisdictions in such matters are conclusive and final.

It is an established principle of law that an inferior tribunal cannot give itself jurisdiction by a wrong decision on a question that is collateral to its jurisdiction, and this principle has been applied by the courts.

Both the Ontario Court of Appeals and the Supreme Court of Canada have considered such matters:[2]

The issues in the case were whether or not the provisions in the Ontario Labour Relations Act about unfair labour practices covered a person carrying out managerial duties and whether or not such a person could be reinstated in employment by order of the board according to the provisions of the act.

The collateral (or preliminary) issue was whether or not the person exercising managerial functions — consequently, not an employee within the definition of the act — was covered by the provisions about unfair labour practices and reinstatement. The main issue was that of reinstatement in employment of a person exercising managerial functions who was dismissed for union activities in alleged contravention of the provisions about unfair labour practices.

The Ontario Court of Appeal upheld the right to review the decision of the board on the collateral issue. The reason was that the board, in deciding such an issue, would be either granting or denying itself the power to deal with the main issue. Thus the Ontario Court of Appeal quashed the board's reinstatement order for want of jurisdiction.

This right of the courts to review and quash such a decision on a collateral issue was justified by Mr. Justice Aylesworth of the Ontario Court of Appeal. In his judgment he stated:

> it is trite to observe that the Board cannot by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have. [p.379]
>
> Once the Board determined, as it had the right to determine, that the complainant was a person deemed not to be an employee for the purposes of the Act it had, *ipso facto,* demonstrated its lack of jurisdiction to proceed further with the complaint. The remedy, if any, of the complainant, lies in another forum. [p.380]

The Supreme Court of Canada, by a majority decision rendered by Mr. Justice Cartwright, agreed with the ruling of the Ontario Court of Appeal and accepted the reasoning of Judge Aylesworth.

---

2 Associated Medical Services Incorporated v. Ontario Labour Relations Board *et al.* (1962) 35 D.L.R. (2d) 375; summarized in the *Labour Gazette* LXIII: 313-5 (April 1963).
Jarvis (Barbara) v. Associated Medical Services Ltd. *et al.* (1964) 44 D.L.R. (2d) 407; summarized in the *Labour Gazette* LXIV: 588-9 (July 1964).

In this decision, Judge Cartwright also dealt with s.80 of the Ontario Labour Relations Act.[3] He indicated why this section, in the circumstances of the case at bar, did not prevent the board's reinstatement order from being quashed. If s.80 were most favourably interpreted for the appellant, the effect would be to oust the jurisdiction of the superior courts to interfere with any decision that the board made under the powers conferred upon it by the legislature, and, within the ambit of these powers, the board could then err in fact as well as in law; but Judge Cartwright did not interpret s.80 to mean that the board could make an order which, in a true construction of the act, it had not the jurisdiction to make, so that the person affected by such an order would be left without remedy. He went on to say that the extent of the board's jurisdiction is fixed by the statute that creates it, and that the jurisdiction cannot be enlarged by the board mistaking the meaning of the statute.

This principle has also been affirmed by Mr. Justice Fauteux[4] who stated:

> The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of superior Courts obtains, notwithstanding the existence in the Act of a no certiorari clause. [p.583]

The judgment of Mr. Justice Freedman of the Manitoba Court of Appeal in the Parkhill Bedding case[5] was another important decision regarding this right: that a buyer of the assets of the bankrupt business was a *new employer* within the meaning of s.18(1)(c) of the Manitoba Labour Relations Act — the decision made by the Manitoba Labour Board — was determined by the court to be collateral to the main issue of whether or not the buyer was bound by the existing collective agreement. The court held that the board could not give itself jurisdiction by a wrong decision on a collateral point upon which depended the limit of its jurisdiction,[6] and that an error on such a point would be reviewable on certiorari.

To classify a matter as collateral is not easy; Judge Freedman analyzed six court decisions[7] to try to find a general principle.

---

3 s.80 reads: No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

4 Toronto Newspaper Guild v. Globe Printing Co. (1953) 3 D.L.R. 561.

5 Parkhill Bedding and Furniture Ltd. v. International Molders and Foundry Workers Union of North America, Local 174, and Manitoba Labour Board. (1960) 33 W.W.R., Part 4, p.176 and (1961) 26 D.L.R. (2d) Part 8, p.589. Summarized in the *Labour Gazette*, LXI: 158-9 (Feb. 1961) and LXI: 477-80 (May 1961).

6 Bunbury v. Fuller (1853), 9 Exch. 111 at p.140.

7 *(See Page 31).*

In the first three, it was held that the issue before each board was part of the main question that had to be decided and that the decision of the board was final and not reviewable in certiorari proceedings.

In the latter three, it was held that the issue before each board was collateral and therefore reviewable in certiorari proceedings, and Judge Freedman found that the determining factor in each case involved an examination of legal principles and considerations that went beyond the context of the particular statute under which the board operated.

In the Workmen's Compensation Act and C.P.R. case, the collateral question that had to be decided was whether the injured person claiming compensation was a workman within the meaning of the Workmen's Compensation Act. The board could not determine this question solely by reference to the Workmen's Compensation Act — where the court acknowledged that the board had jurisdiction — but had also to apply the general law applicable to master and servant.

In the Zwicker and Lunenburg case the board had exclusive jurisdiction to certify the bargaining agent, though it had first to decide the collateral question of whether or not the crew members of certain fishing vessels were employees within the scope of the labour relations act; and that question had to be decided by reference to the law of partnership, an area outside the scope of the statute over which the board had jurisdiction.

In the case of The King v. the Nova Scotia Labour Relations Board, the board had to determine whether or not policemen were employees under the Nova Scotia Trade Union Act before dealing with a certification application of a policemen's association. The court held that the question of the status of policemen was collateral because it could only be determined by an examination of law outside the extent of the Nova Scotia Trade Union Act.

The principle behind the decisions of these three cases could also be applied to the Parkhill Bedding case.[8] Such was Judge Freedman's opinion when this case was before him. The board could not determine whether the

---

7 Re Ontario Labour Relations Board, Bradley *et al.* v. Canadian General Electric Company Ltd. (1957) 8 D.L.R. (2d) 65; summarized in the *Labour Gazette*, LVII: 860-2 (July 1957).

Labour Relations Board and Attorney-General of British Columbia and Retail, Wholesale and Department Store Union, Local 580 v. Traders' Service Ltd. (1958) S.C.R. 672; summarized in the *Labour Gazette*, LIX: 58-60 (January 1959).

Re United Mine Workers of America, District No. 26 (1960) 23 D.L.R. (2d) 328; summarized in the *Labour Gazette*, LX: 832-5 (August 1960).

Re Workmen's Compensation Act, Canadian Pacific Railway Company and Order A-43151 of the Workmen's Compensation Board (1950) 2 D.L.R. 630; summarized in the *Labour Gazette*, L: 895-6 (June 1950).

Re Zwicker and Lunenburg Sea Products Ltd. (1947) 3 D.L.R. 195; summarized in the *Labour Gazette*, XLVII: 381-3 (March 1947).

The King, on the relation of Reginald Bonang *et al.* v. Nova Scotia Labour Relations Board (1951) 4 D.L.R. 227; summarized in the *Labour Gazette*, LI: 1697-9 (December 1951).

8 See footnote 5 of this Chapter.

collective agreement was binding on the Parkhill Company until it had considered whether or not that company was a *new employer* to whom the business of a bankrupt company had passed. That issue involved consideration of legal principles outside those of the labour relations act, such as those pertaining to bankruptcy, to the effect of bankruptcy on contracts of workmen, to the powers of a trustee in bankruptcy and to the title acquired by a purchaser of assets, as well as to the question of whether or not the title might be encumbered by obligations under a collective agreement. Consequently, this issue was collateral; however, the board had to deal with the issue before it could proceed to adjudicate on whether or not the collective agreement was binding on the new company under the provisions of the act. On such a collateral issue the board could be right or wrong, but the decision would be subject to review by the courts.

Another example of collateral matter would be the constitutional question of whether an industry is subject to federal or provincial labour legislation. Before proceeding with an application for certification, a board would first have to decide this collateral matter of jurisdiction, and such a decision could not be exclusive and final. The decision would be open to review on certiorari and could be quashed by a court if it were not a correct decision.

ERROR OF LAW ON THE FACE OF THE RECORD

Judicial review of the board's decisions on the ground of error of law on the face of the record is rooted in English legal practices. It assumes the existence of a *record of decision,* it raises the question as to what constitutes the record and leaves to the courts a large measure of discretion in deciding the issue.

Yardley, describing the history of this practice, stated:[1]

> In 1700 the record consisted of all those documents which were kept by the tribunal for a permanent memorial and testimony of their proceedings; the Court of King's Bench determined what was the record, and if it was incomplete or defective when returned it was quashed.

To prevent quashing convictions for trivial defects, the British Parliament enacted in 1848 the Summary Jurisdiction Act prescribing a standard form of conviction where there was no mention of the evidence presented or reasons for judgment, and the record stated on the actual conviction.[2]

In the Northumberland case[3] it was held that the 1848 act did not eliminate error of law on the face of the record as a reason for certiorari.[4]

---

1 Yardley, D.C.M., "The Grounds for Certiorari and Prohibition", *Canadian Bar Review,* Vol. XXVII, No. 2 (May 1959) p.324.

2 *Ibid.*, p.323.

3 R. v. Northumberland Compensation Appeal Tribunal, *ex parte* Shaw (1951) 1 K.B. 711 aff'd (1952) 1 K.B. 338 (C.A.).

4 Yardley, D.C.M. "The Grounds for Certiorari . . .", p.326.

Lord Sumner in the Nat Bell Liquors case[5] explained the results of the 1848 act by stating:

> The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a 'sphinx'. [p.159]

The Northumberland case of 1952 extended the application of certiorari on the ground of error of law on the face of the record to decisions of administrative tribunals and has been often referred to in Canadian decisions.

References to some court decisions may show the approach of the Canadian courts regarding the circumstances where there is an error of law on the face of the record justifying the quashing of boards' decisions.

In the Simpsons-Sears Limited case,[6] the Saskatchewan Court of Appeal quashed the Labour Relations Board's order for reinstatement and compensation in respect of an illegally dismissed employee. The order was quashed on the ground of error of law on the face of the record which resulted from the failure of the board to consider principles of mitigation of damages in assessing the amount of compensation due to the employee. The board in fixing the loss of wages for which the employee was to be compensated, deducted the amount of unemployment insurance received, and there was evidence that the employee had worked on his father's farm for board and lodging between the dates on which his loss was estimated. The court held that the order must be quashed because the value of the board and lodging should have been considered as a mitigation of damages and, also, that the employee's duty was to minimize his loss by taking available work.

In the Gordon Riley Transport case,[7] the employer was forced to lay off most of his employees temporarily. The union immediately applied for certification. The Labour Relations Board, in granting certification to the union on the ground that the majority of the employees at the date of application were members of the union, failed to consider laid-off employees. The company applied for certiorari to quash the certification order on the ground of error of law on the face of the record. The court quashed the order and held that the decision of the board that it could only consider the facts as they existed on the application date was an error of law, as the decision was taken without giving due consideration to other provisions of the Alberta Labour Act. In making the certification order, the board denied to itself jurisdiction conferred to inquire into all facts which, in its opinion, were material, and was not exercising discretion as to what were, or were not, material facts to be considered. As the decision of the board was based on

---

5 The King and Nat Bell Liquors Ltd. (1922) 2 A.C. 128.

6 Simpson-Sears Limited v. Department Store Organizing Committee, Local 1004 (1956) 3 D.L.R. (2) 517; summarized in the *Labour Gazette*, LVI: 875-876 (July 1956).

7 Re Gordon Riley Transport Ltd. and Board of Industrial Relations of Alberta (1958) 13 D.L.R. (2d) 375; summarized in the *Labour Gazette*, LVIII: 505-507 (May 1958).

wrong principles of law appearing on the face of the record and not on the exercise of its discretion, the court held that the decision may be quashed by the court, as decisions made by an inferior tribunal that has exceeded its jurisdiction may be quashed.

It was also stressed by the court that the purpose of the Alberta Labour Act was to ensure fair dealings between employer and employee. Therefore, it would not be fair if either the employer or employee were permitted to take advantage of an abnormal temporary situation and to gain advantage which he would not otherwise have had. In quashing the certification order on the ground of error of law on the face of the record, the court relied on the British Court of Appeal decision in the Northumberland case,[8] where it was held that certiorari to quash the decision of a statutory tribunal lies not only where the tribunal has exceeded its jurisdiction, but also where an error in law appeared on the face of the record.

In particular, the court quoted Lord Justice Denning, who, after referring to the argument that a court should not assign to itself an appellate jurisdiction which has not been given, stated:

> The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law... When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had. [p.346-7]

Further, the court referred to another statement by Lord Denning who, with reference to the scope and purposes of certiorari and the wide powers of the Court of King's Bench in certiorari proceedings, stated in the Northumberland case:

> Of recent years the scope of certiorari seems to be somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of error of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction ... Until about one hundred years ago, certiorari was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control. [p.348]

---

8 (1952) 1 K.B. 338.

In the MacCosham Storage case,[9] the company applied in certiorari proceedings to quash the Labour Relations Board's order of reinstating an employee when the board found the employer guilty of unfair labour practices (interfering with the employee's union activities) under s.8(1)(e) of the Saskatchewan Trade Union Act. The company based its application on the ground that (1) there was error on the face of the order in failing to specify the facts or ingredients which made the discharge an unfair labour practice within the meaning of s.8(1)(e) of the act, and (2) there was an error on the face of the order in requiring reinstatement within 24 hours after service of the order instead of forthwith, and that consequently the delay in effectiveness of the order contradicted the finding of an unfair labour practice.

The Saskatchewan Court of Appeal, in a majority decision, dismissed the application and upheld the order on the ground that the finding of an unfair labour practice was sufficiently expressed in the board's order. Further, the court quoted from Taylor v. Clemson (1844), 11 Cl. and Fin. 610. at p.640, to the effect that while the order must set forth such facts as to show that it has jurisdiction and in what respect it has jurisdiction, it was unnecessary that it set forth all the facts or particulars out of which jurisdiction arises. Also, the court held that the board's order was not defective in not directing reinstatement forthwith. Its power in that respect was not limited as to the time and the board had a discretion in regard to all the circumstances before it.

In the Tag's Plumbing case,[10] the Saskatchewan Court of Appeal considered the employer's application to quash an order of the Labour Relations Board declaring that the employer had engaged and continued to engage in an unfair labour practice and requiring the employer to refrain from so engaging. The court, taking into consideration the existence of the privative clause in the Saskatchewan Trade Union Act, stated that, in its review of an order of the board in certiorari proceedings, the court was restricted to determining whether the board acted within its jurisdiction or whether there was error apparent on the face of the record. Further, it was stated that the problem when the board errs was whether the error was one going to jurisdiction or one on an issue within its jurisdiction.

Considering further the question of the alleged error in law apparent on the face of the record, Mr. Justice Culliton (who rendered the judgment of the court), stated:

---

9 MacCosham Storage and Distributing Company (Saskatchewan) Ltd., v. Canadian Brotherhood of Railway Employees and other Transport Workers, Division No. 189 (1958) 14 D.L.R. (2d) 725; summarized in the *Labour Gazette*, LVIII: 1163-5 (October 1958).

10 Regina v. Labour Relations Board of Saskatchewan, *ex parte* Tag's Plumbing & Heating Limited (1962) 34 D.L.R. (2) 128; summarized in the *Labour Gazette*, LXII: 1289-91 (November 1962).

> The allegation of error in law on the face of the record can only be substantiated if the Board is bound not only to record its findings, but also the evidence upon which the findings were based. Learned counsel for the applicant submitted that it was the duty of the Board to find the facts and to record them and this the Board had failed to do. In support of this submission, he referred the Court to the statement of MacDonald, J. A. who, in delivering the judgment of this court in *John East Iron Works v. Labour Relations Board of Saskatchewan,* (1949) 3 D.L.R. 51 at p. 58, said: "Not only is it the duty of the Board to find the necessary facts but it is also its duty to record them." I do not construe the foregoing statement as a requirement that the Board record the evidence upon which its findings are based. [p.134]

In the opinion of Judge Culliton, the finding and recording of the board[11] completely satisfied the requirement, both of the act and of the directions of Mr. Justice MacDonald. Further, relying on the view taken by the court in MacCosham Storage case, *supra,* the court upheld the board's order on the ground that there was no error apparent on the face of the record.

In the Celgar case,[12] the British Columbia Supreme Court did not find an error of law on the face of the record of two remedial orders (to cease and desist and to rectify wrongful acts) made by the B.C. Labour Relations Board against a trade union. In refusing to quash these orders, the court held that, in the application to quash the orders on the ground of error of law on the face of the record, the court may not look beyond the record itself, namely, the orders complained of, and in particular, the court may not look at a collective agreement or at any evidence placed before the lower tribunal.

As to the question of what constituted an error on the face of the award, the court quoted from a judgment of Lord Dunedin:[13]

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated therein, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and you can then say that it is erroneous. It does not mean that if in a narrative a refer-

---

11 The board found and recorded the facts as follows:
This board being satisfied on the evidence adduced that the applicant is a trade union and that while the employees of the respondent company were attempting to organize into a trade union at the instance of the applicant union the respondent company by its manager . . . in the fall of 1960 did:

1. Interrogate the respondent's employees and prospective employees to ascertain whether or not they belonged to a union or participated in the activities of a union and intimated to them that no union member or supporter would be hired and did thereby:
   (a) Interfere with the employees in the exercise of their right to organize in and to form, join or assist the applicant trade union and to bargain collectively through representatives of their own choosing;
   (b) Discriminate in regard to hiring or tenure of employment with a view to discouraging membership or activity in or for labour organizations;
   (c) Require as a condition of employment that said employees or prospective employees should abstain from joining or assisting, or being active in a trade union.

12 Re Labour Relations Act; Pulp and Paper Workers of Canada, Watson Island, Local No. 4. v. Celgar Limited and the Labour Relations Board of B.C. (1964) 48 W.W.R. Part 9, p.555; summarized in the *Labour Gazette;* LXV: 159-161 (February 1965).

13 Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. (1923) A.C. 480, 92 L.J.P.C. 163.

> ence is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. [p.166]

From the review of Canadian cases, it would appear that the issue of error of law on the face of the record as a ground for certiorari is more difficult and perhaps more complicated than other grounds for quashing decisions of labour relations boards by the use of prerogative writs.